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AUG 17 2000  
CLERK U S DISTRICT COURT  
DISTRICT OF ARIZONA  
BY                      DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

UNITED ARTISTS THEATRE	)	No. CIV 00-274-PHX-RCB
CIRCUIT, INC., a Maryland	)	
corporation,	)	<b>O R D E R</b>
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
The FEDERAL COMMUNICATIONS	)	
COMMISSION;	)	
	)	
WILLIAM E. KENNARD, an	)	
individual, in his capacity as	)	
Chairman of the Federal	)	
Communications Commission;	)	
	)	
ESI ERGONOMIC SOLUTIONS,	)	
L.L.C., an Arizona limited	)	
liability corporation,	)	
	)	
Defendants.	)	
	)	
	)	

Defendant ESI Ergonomic Solutions, L.L.C. (ESI), has moved the court to dismiss the complaint against it. ESI contends that the court lacks subject matter jurisdiction to adjudicate the claims of United Artists Theatre Circuit, Inc. (United Artists) for declaratory relief. Alternatively, in the event that the

1 court has subject matter jurisdiction, ESI urges the court to  
2 abstain from exercising it in light of parallel proceedings  
3 between ESI and United Artists in the Superior Court in Maricopa  
4 County. The federal Defendants answered the complaint with a  
5 request that the court dismiss it, but they have not submitted a  
6 motion to dismiss or joined in ESI's motion. The court heard  
7 oral argument on ESI's motion on June 26, 2000. Having carefully  
8 considered the matter, the court now rules.

9 BACKGROUND

10 United Artists petitions the court for a declaration that  
11 certain provisions of the Telephone Consumer Protection Act  
12 (TCPA) violate the First Amendment. As United Artists explains,  
13 the TCPA was enacted in 1991 and is codified at 47 U.S.C. § 227.  
14 Among other restrictions on the commercial use of telephone  
15 equipment, the statute makes it unlawful "to use any telephone  
16 facsimile machine, computer, or other device to send an  
17 unsolicited advertisement to a telephone facsimile machine." 47  
18 U.S.C.A. § 227(b)(1)(C) (West Supp. 1999). An unsolicited  
19 advertisement is "any material advertising the commercial  
20 availability or quality of any property, goods or services which  
21 is transmitted to any person without that person's prior express  
22 invitation or permission." Id. § 227(a)(4). The statute  
23 contemplates a variety of actions, including a private right of  
24 action in state courts for recipients of unsolicited faxes. Id.  
25 § 227(b)(3).

26 A person or entity may, if otherwise permitted by the  
27 laws or rules of court of a State, bring in an  
appropriate court of that State--

28 (A) an action based on a violation of this  
subsection or the regulations prescribed  
under this subsection to enjoin such

1 violation,  
2 (B) an action to recover for actual monetary  
3 loss from such a violation, or to receive  
4 \$500 in damages for each such violation,  
5 whichever is greater, or  
6 (C) both such actions.  
7 If the court finds that the defendant  
8 willfully or knowingly violated this section  
9 or the regulations prescribed under this  
10 subsection, the court may, in its discretion,  
11 increase the amount of the award to an amount  
12 equal to not more than 3 times the amount  
13 available under subparagraph (B) of this  
14 paragraph.

15 Id. § 227(b)(3). Actions by state attorneys general are also  
16 authorized. See id. § 227(f).

17 United Artists contends that it learned of the statute only  
18 recently. In 1999, unaware of the TCPA, United Artists hired  
19 American Blast Fax, Inc. (Blast Fax) to send 90,000 one-page  
20 advertisements to businesses in the Phoenix area. Compl. ¶¶ 7,  
21 9. The advertisement offered movie tickets at discount prices.  
22 Response at 2-3. About 179 businesses responded and bought  
23 tickets, another 89,820-odd businesses did not respond, and one,  
24 ESI, filed suit in the Superior Court in Maricopa County against  
25 United Artists and Blast Fax for violating the TCPA. ESI seeks  
26 to incorporate the other 89,999 recipients as members of a  
27 plaintiff class; if the statutory penalty of \$500 per fax were  
28 imposed, statutory damages would amount to \$45 million. If the  
penalty were tripled upon a finding that United Artists'  
violation was willful--something that United Artists denies--  
United Artists' liability would inflate to \$135 million.

While in the midst of litigating the state court action, on  
February 14, 2000, United Artists filed a complaint in this court  
seeking a declaration that 47 U.S.C. § 227(b) is

1 unconstitutional, and a permanent injunction against efforts by  
2 the FCC and private parties to enforce the statute against  
3 "purely intrastate faxing." Compl. at 6. In moving to dismiss  
4 the federal complaint, ESI contends that United Artists'  
5 complaint reveals no justiciable controversy between United  
6 Artists and a private party like itself, nor is there an  
7 independent basis for federal jurisdiction. It also argues that  
8 comity requires federal abstention.

9       During briefing on ESI's motion to dismiss in this court,  
10 proceedings in the Superior Court have gone forward. As a  
11 defendant in the state court action, United Artists filed a  
12 series of dispositive motions, notably two motions for summary  
13 judgment challenging the constitutionality of the TCPA.<sup>1</sup> Based  
14 on the papers submitted to that point, Judge Norman J. Davis was  
15 not persuaded that the TCPA is unconstitutional. "Nor does this  
16 Court find that the TCPA embodies apparent constitutional  
17 violations of either the United States Constitution or the  
18 Arizona Constitution at this point." He denied the summary  
19 judgment motions, as well as the other pending dispositive  
20 motions. See Reply, Ex. 1 (Order of May 5, 2000).

21       From the order, the nature of the constitutional theories  
22 advanced by United Artists and rejected by Judge Davis is not  
23 clear. According to United Artists, summary judgment was sought  
24 on the ground that TCPA suits are not "permitted" under Arizona  
25 law because they violate the free speech and due process clauses

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26  
27       <sup>1</sup> At oral argument, counsel for the parties agreed that the  
28 dispositive motions raising constitutional theories were filed in  
the Superior Court action prior to the filing of the complaint at  
issue here.



1 Charles Alan Wright & Arthur R. Miller, Federal Practice &  
2 Procedure § 1350 (2d ed. 1990 and Supp. 1999). Subject matter  
3 jurisdiction is an issue logically prior to the propriety of  
4 abstention. "Only after a court is satisfied that standing and  
5 the other jurisdictional prerequisites are met may it determine,  
6 within its discretion, whether to abstain." City of South Lake  
7 Tahoe v. Cal. Regional Planning Agency, 625 F.2d 231, 233 (9<sup>th</sup>  
8 Cir. 1980).

9 A. Subject Matter Jurisdiction

10 A motion to dismiss for lack of subject matter jurisdiction  
11 is analyzed under Fed. R. Civ. P. 12(b)(1). Like other motions  
12 to dismiss, complaints are construed broadly and the non-moving  
13 party is entitled to all reasonable inferences that can be drawn  
14 in its favor. Smith v. Gross, 604 F.2d 639, 641 n. 1 (9<sup>th</sup> Cir.  
15 1979). All uncontested factual allegations are accepted as true.  
16 Doe v. Schacter, 804 F.Supp. 53, 57 (N.D. Cal. 1992). The  
17 court's review is not restricted to the scope of the pleadings,  
18 but may extend to evidence offered by the parties to resolve  
19 factual disputes going to the jurisdictional issue. McCarthy v.  
20 United States, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988). The burden of  
21 proof on a Rule 12(b)(1) motion is on the party asserting  
22 jurisdiction. Ashoff v. City of Ukiah, 130 F.3d 409, 410 (9<sup>th</sup>  
23 Cir. 1997).

24 The Declaratory Judgment Act, 28 U.S.C. § 2201, is not  
25 a jurisdictional statute. See Fiedler v. Clark, 714 F.2d 77, 79  
26 (9<sup>th</sup> Cir. 1983). Federal jurisdiction must exist independently.  
27 To establish jurisdiction, federal declaratory judgment actions  
28 must satisfy the well-pleaded complaint rule, which screens

1 complaints that anticipate defenses based on federal law. See  
2 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673-74,  
3 70 S.Ct. 876 (1950). Since declaratory actions invert actions  
4 to enforce rights, the well-pleaded complaint analysis ascertains  
5 whether the declaratory judgment defendant could have brought a  
6 coercive action arising under federal law. Standard Ins. Co. v.  
7 Saklad, 127 F.3d 1179, 1180 (9<sup>th</sup> Cir. 1998) (quoting Janakes v.  
8 United States Postal Service, 768 F.2d 1091, 1093 (9<sup>th</sup> Cir.  
9 1985)); see generally 15 James Wm. Moore, Moore's Federal  
10 Practice § 103.44[1] at 103-67 (3<sup>rd</sup> ed. 1997).

11 The Declaratory Judgment Act gives district courts authority  
12 to accept only those actions that comport with the statute's  
13 purposes by making jurisdiction discretionary and not mandatory.  
14 See Wilton v. Seven Falls Co., 515 U.S. 277, 288, 115 S.Ct. 2137,  
15 2143 (1995); see also Natural Resources Defense Council v. U.S.  
16 EPA, 966 F.2d 1292, 1299 (9<sup>th</sup> Cir. 1992). The Declaratory  
17 Judgment Act enables federal courts to "grant a new form of  
18 relief to qualifying litigants" who want to ascertain their  
19 liability for actions already taken or presently contemplated.  
20 Wilton, 115 S.Ct. at 2143. Declaratory actions are intended to  
21 serve the salutary purpose of avoiding "multiplicity of actions  
22 by affording an adequate, expedient, and inexpensive means for  
23 declaring in one action the right and obligations of litigants."  
24 United Food & Commercial Workers v. Food Employers Council, Inc.,  
25 827 F.2d 519, 524 (9<sup>th</sup> Cir. 1987) (quotation omitted). "It is  
26 not the function of the Declaratory Judgment Act to allow  
27 disputes arising in the course of state court litigation to be  
28 argued in the federal courts instead." Shell Oil Co. v.

1 Frusetta, 290 F.2d 689, 692 (9<sup>th</sup> Cir. 1961); see also American  
2 National Fire Ins. Co. v. Hungerford, 53 F.3d 1012, 1018 (9<sup>th</sup>  
3 Cir. 1995) (no reason why relief could not be better sought in  
4 state declaratory judgment action), overruled on other grounds in  
5 Government Employees Ins. Co. v. Dizol, 133 F.3d 1220 (9<sup>th</sup> Cir.  
6 1998) (en banc); see generally 10B Charles A. Wright, et al.,  
7 Federal Practice & Procedure § 2758 at 519-21 (3d ed. 1998).  
8 Where the same issues are under consideration by another court,  
9 discretionary refusal to accept jurisdiction of the declaratory  
10 action may be appropriate. Fireman's Fund Ins. Co. v. Ignacio,  
11 860 F.2d 353 (9<sup>th</sup> Cir. 1988), abrogated on other grounds by  
12 Wilton, 115 S.Ct. at 2144.

13 United Artists asserts that federal question jurisdiction  
14 exists in its suit against ESI because it challenges the validity  
15 of a federal statute under the United States Constitution, citing  
16 Moore's Federal Practice, supra, § 103.32[1] at 1054.<sup>2</sup> Response  
17 at 4. What United Artists' statement purporting to align its  
18 complaint with other constitutional challenges ignores is the  
19 inverted nature of its declaratory cause of action. The problem  
20 with its assumption that its case is analogous to other facial  
21 challenges is that federal subject matter jurisdiction for  
22 declaratory judgment actions is predicated on the federal  
23 jurisdiction of the suit anticipated. See United Food &

24 \_\_\_\_\_  
25 <sup>2</sup> The treatise relies on Action for Children's Television v.  
26 F.C.C., 59 F.3d 1249, 1256 (D.C. Cir. 1995) ("Because a facial  
27 challenge to the constitutionality of a federal statute raises a  
28 federal question, the district court would ordinarily have  
jurisdiction under 28 U.S.C. § 1331."). Clearly, this rule  
presupposes that the party making the facial claim has a cause of  
action, or a vehicle.



1 Commercial Workers, 827 F.2d at 523.

2 If the cause of action, which the declaratory defendant  
3 threatens to assert, does not itself involve a claim  
4 under federal law, it is doubtful if a federal court  
5 may entertain an action for a declaratory judgment  
6 establishing a defense to that claim. This is dubious  
even though the declaratory complaint sets forth a  
claim of federal right, if that right is in reality in  
the nature of a defense to a threatened cause of  
action.

7 Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 248-49,  
8 73 S.Ct. 236, 242-43 (1952). While United Artists asserts First  
9 Amendment rights, it seeks to strike down a statute under which  
10 it faces significant liability in another litigation. Thus, the  
11 constitutional question United Artists poses with respect to the  
12 private right of action under the TCPA must be recognized as a  
13 defense. Only if ESI's suit in the state court under 47 U.S.C. §  
14 227(b) is justiciable in federal court will federal subject  
15 matter jurisdiction exist for United Artists' defensive  
16 declaratory action.

17 That question has been conclusively answered to the negative  
18 in the Ninth Circuit. See Murphey v. Lanier, 204 F.3d 911, 915  
19 (9<sup>th</sup> Cir. 2000).<sup>3</sup> The text of the TCPA does not specifically  
20 authorize federal jurisdiction over private actions. See  
21 International Science & Tech. Institute v. Inacom Comm., 106 F.3d  
22 1146 (4<sup>th</sup> Cir. 1997); Chair King, Inc. v. Houston Cellular Corp.,  
23 131 F.3d 507, 509 (5<sup>th</sup> Cir. 1997). Nor does an interpretation of  
24 "the whole law, its object, and its policy." ErieNet, Inc. v.

25

26 <sup>3</sup> "We join the Second, Third, Fourth, Fifth and Eleventh  
27 Circuits in the somewhat unusual conclusion that state courts  
28 have exclusive jurisdiction over a cause of action created by a  
federal statute, the Telephone Consumer Protection Act of 1991."  
Murphey, 204 F.3d at 915 (quotation omitted).

1 Velocity Net, Inc., 156 F.3d 513, 516 (3<sup>rd</sup> Cir. 1998). "[T]he  
2 mere need for federal legislation and provision of remedies does  
3 not give a right of access to a federal forum." Id. at 517.

4 In the absence of an express jurisdictional grant to the  
5 federal courts in the statute, federal jurisdiction over private  
6 TCPA actions cannot alternatively be obtained under the general  
7 federal question jurisdiction statute:

8 It is true that, as a general matter, a cause of  
9 action created by federal law will properly be brought  
10 in the district courts. But "despite the usual  
11 reliability of the principle that a suit arises under  
12 the law that creates the cause of action, the Supreme  
Court has sometimes found that formally federal causes  
of action were not properly brought under federal-  
question jurisdiction."

. . . . .

13 We have similarly concluded that Congress intended that  
14 private TCPA cases be litigated in state courts, if the  
state consents.

15 International Science, 106 F.3d at 1154 (quoting Merrell Dow  
16 Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 814 n.2, 106  
17 S.Ct. 3229, 3235 n.2 (1986)); accord Foxhall Realty Law Offices  
18 v. Telecommunications Premium Services, Ltd., 156 F.3d 432, 436  
19 (2d Cir. 1998) (it is enough that Congress intended to assign  
20 private rights of action exclusively to courts other than the  
21 federal district courts; a specific carve-out prohibiting general  
22 federal question jurisdiction is unnecessary). By virtue of a  
23 specific assignment of jurisdiction to state courts, Congress  
24 negates district court jurisdiction under § 1331. ErieNet, 156  
25 F.3d at 519.

26 The legislative history, and particularly the statement of  
27 the bill's sponsor, Senator Ernest F. Hollings, is useful in  
28 confirming a congressional intent to limit private TCPA actions to

1 state courts:

2 The substitute bill contains a private right-of-action  
3 provision that will make it easier for consumers to  
4 recover damages from receiving these computerized calls.  
5 The provision would allow consumers to bring an action  
6 in State court against any entity that violates the  
7 bill. The bill does not, because of constitutional  
8 constraints, dictate to the States which court in each  
9 State shall be the proper venue for such an action, as  
10 this is a matter for State legislators to determine.  
11 Nevertheless, it is my hope that States will make it as  
12 easy as possible for consumers to bring such actions,  
13 preferably in small claims court. . . .

14 Small claims court or a similar court would allow  
15 the consumer to appear before the court without an  
16 attorney. The amount of damages in this legislation is  
17 set to be fair to both the consumer and the  
18 telemarketer. However, it would defeat the purposes of  
19 the bill if the attorneys' costs to consumers of  
20 bringing an action were greater than the potential  
21 damages. I thus expect that the States will act  
22 reasonably in permitting their citizens to go to court  
23 to enforce this bill.

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1 arguments); Foxhall Realty, 156 F.3d at 437-38 (rejecting equal  
2 protection claim). It is critical to note that these  
3 constitutional arguments speak only to the propriety of exclusive  
4 state court jurisdiction and do not challenge the substantive  
5 provisions of the TCPA private action.

6 By contrast, where such a challenge was made and ruled on,  
7 federal subject matter jurisdiction for the ruling was held to be  
8 lacking. See Chair King, 131 F.3d at 509. In a case before the  
9 Fifth Circuit, the district judge reached the merits of  
10 allegations that the TCPA violates the First and Fifth Amendments  
11 (she held that it does not). See id., 131 F.3d at 509. Upon  
12 finding that state courts have exclusive subject matter  
13 jurisdiction over private actions, the Court of Appeals vacated  
14 the lower court's order and remanded with directions to dismiss.  
15 See id. While the court did not explicitly consider whether the  
16 federal court had jurisdiction to entertain a constitutional  
17 challenge to the statute apart from a private litigant's attempt  
18 to enforce it, Chair King stands for the proposition that federal  
19 courts lack jurisdiction over constitutional defenses to TCPA  
20 actions when those actions are consigned exclusively to state  
21 courts.<sup>4</sup> After all, "[f]or a court to pronounce upon the meaning  
22 or the constitutionality of a state or federal law when it has no

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23  
24 <sup>4</sup> The Ninth Circuit case that United Artists cites as an  
25 indication that this court has jurisdiction over its claim  
26 against ESI is inapposite. See Destination Ventures, Ltd. v.  
27 F.C.C., 46 F.3d 54 (9<sup>th</sup> Cir. 1995). There, Destination Ventures  
28 sued the FCC seeking a declaratory judgment that the statute  
violated the First Amendment. Because the FCC does not file  
private rights of action, an anticipated suit by the agency was  
not subject to the jurisdictional restriction of § 277(b)(3).  
Incidentally, the Ninth Circuit upheld the constitutionality of  
the challenged provision.

1 jurisdiction to do so is, by very definition, for a court to act  
2 ultra vires." Steel Co. v. Citizens for a Better Environment, 523  
3 U.S. 83, 102, 118 S.Ct. 1003 (1998). In addition, it is hard to  
4 imagine how, without falling afoul of the advisory opinion  
5 prohibition, the court could entertain only the constitutional  
6 question without reference to the threatened lawsuit over which it  
7 lacks jurisdiction.

8 United Artists tries to fit its claim to a familiar model,  
9 despite the repeated statements of the Courts of Appeals  
10 recognizing the "unusual constellation of statutory features"  
11 presented by the TCPA. Murphey, 204 F.3d at 915 (quoting ErieNet,  
12 156 F.3d at 515). It contends that Duke Power Co. v. Carolina  
13 Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620  
14 (1978), controls. Assuming that Duke Power remains good law, the  
15 court rejects its applicability on its facts.<sup>5</sup>

16 The case arose from the utility company Duke Power's plan to  
17 \_\_\_\_\_

18 <sup>5</sup> A leading treatise criticizes Duke Power's standing and  
19 justiciability analysis, questioning why the NRC was found to be  
20 a proper party when it had no enforcement authority over the  
21 liability limit statute. Moore's Federal Practice, *supra* §  
22 103.44[2] at 103-71.

23 Dissenting in Duke Power, then-Associate Justice Rehnquist  
24 viewed the matter as a declaratory judgment for state tort  
25 damages against Duke Power, to which Duke Power was presumed, for  
26 the purpose of the declaratory action, to raise the federal  
27 statute as a defense to liability. He urged that the case  
28 against Duke Power should be thrown out of federal court under  
the well-pleaded complaint rule. 438 U.S. at 97 (Rehnquist, J.,  
dissenting). The same commenter takes issue with Justice  
Rehnquist's analysis, even while finding it "all too persuasive,"  
on the grounds that "in a case involving a vital matter of  
federal policy as well as important and difficult questions of  
federal law, suit could not be brought in federal court."  
Moore's Federal Practice, *supra* at § 103.44[2] at 103-702.  
Regardless whether that result is desirable in the case of the  
federal nuclear liability statute, there is no question that with  
the TCPA, it is precisely the outcome that Congress expects.

1 put up some nuclear power plants. Citizens' organizations sued  
2 Duke Power on the theory that a federal statute limiting the  
3 utility's liability in the event of an accident was  
4 unconstitutional. See id. at 67-68. The plaintiffs included the  
5 United States Nuclear Regulatory Commission (NRC) as a co-  
6 defendant. See id. The Court found no basis for jurisdiction  
7 over either Duke Power or the NRC in the federal liability  
8 statute, but it determined that the general federal question  
9 jurisdiction statute conferred jurisdiction to hear the  
10 constitutional case defended by the NRC. See id. at 71. As far  
11 as Duke Power was concerned,

12 We need not resolve the question of whether Duke Power  
13 is a proper party since jurisdiction over appellees'  
14 claim against the NRC is established, and Duke's  
15 presence or absence makes no material difference to  
16 either our consideration of the merits of the  
17 controversy or our authority to award the requested  
18 relief.

16 Id. at 72, n. 16.<sup>6</sup> At oral argument, ESI argued that the reason  
17 the Supreme Court did not consider itself obliged to answer this  
18 question is because it dismissed the case on other grounds.

19 The issues Duke Power resolved are quite distinct from those  
20 in play here. In determining that federal jurisdiction existed  
21 over the citizen's suit against the NRC, Duke Power applied the  
22

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23 <sup>6</sup> Alert to this footnote, United Artists states that it is  
24 indifferent about ESI's participation: "ESI was named as a  
25 defendant in this action to afford it the opportunity to defend  
26 the TCPA's constitutionality. If ESI does not wish to avail  
27 itself of that opportunity, we have no objection. However, we  
28 fully intend to argue that the TCPA's unconstitutionality bars  
ESI's state-court claim." Response at 6. At oral argument, the  
parties debated the effect that a ruling here in United Artists'  
favor could have vis-à-vis the state litigation, to sound out  
whether a federal ruling could help United Artists or prejudice  
ESI.

1 general rule that 28 U.S.C. § 1331 confers jurisdiction over  
2 actions challenging federal laws. What United Artists ignores is  
3 that in this case, Congress has trumped the general rule by  
4 specifically assigning jurisdiction over the private TCPA actions  
5 to state courts. See ErieNet, 156 F.3d at 518-19. Congress has  
6 the authority to restrict federal jurisdiction by statute to  
7 encompass less than the Constitution would allow. Sheldon v.  
8 Sill, 49 U.S. (8 How.) 441 (1850); see generally, Gerald Gunther,  
9 Congressional Power to Curtail Federal Court Jurisdiction: An  
10 Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895,  
11 918-19 (1984). The TCPA clearly recognizes this power. Section  
12 1331 confers jurisdiction to the federal courts only if another,  
13 more specific statute does not relegate jurisdiction to other  
14 courts. See ErieNet, 156 F.3d at 518; see also Carpenter v. Dep't  
15 of Transportation, 13 F.3d 313, 316 (9<sup>th</sup> Cir. 1994) (specific  
16 grants of exclusive jurisdiction "override" general grants of  
17 jurisdiction to district courts); see generally, Kevin N. Tharp,  
18 Note, Federal Court Jurisdiction over Private TCPA Claims: Why  
19 the Federal Courts of Appeals Got It Right, 52 Fed. Comm. L.J. 189  
20 (1999). Thus, determining whether federal jurisdiction exists  
21 over private TCPA actions does not require reference to the  
22 background assumptions about the scope of the federal question  
23 statute, but is plainly discernible in the express Congressional  
24 allocation of jurisdiction.

25 Moreover, Duke Power is distinguishable given its procedural  
26 posture. This case compels resolution of the very question Duke  
27 Power did not reach, because ESI has specifically asked to be  
28 dismissed from this action. The court must decide whether it has

1 subject matter jurisdiction over the claim against ESI, and if it  
2 does not, it must grant ESI's motion and dismiss the claim against  
3 it. Having found Duke Power does not guide the decision here, the  
4 court concludes that Chair King is the best authority on this  
5 issue. Accordingly, the court finds that it lacks subject matter  
6 jurisdiction over the action against ESI.

7 At oral argument, United Artists' presented a jurisdictional  
8 theory not described in its papers and new to ESI. Conceding that  
9 no original federal jurisdiction exists over its claim against  
10 ESI, United Artists contended that the court should entertain the  
11 claim based on supplemental jurisdiction pursuant to 28 U.S.C. §  
12 1367.<sup>7</sup> Reliance on supplemental jurisdiction raises questions  
13 about federal jurisdiction over the claim against the FCC, on  
14 which the claim against ESI would then depend. While United  
15 Artists insists that federal jurisdiction over the FCC is mandated  
16 under Duke Power, ESI questions whether the facts support a  
17 finding that United Artists has standing to sue the agency. ESI  
18 contends that the FCC has shown no interest in pursuing United  
19 Artists under the TCPA, so that there is no live controversy  
20 between the FCC and United Artists for judicial resolution.

21 In answering United Artists' complaint, the FCC denies that  
22 United Artists is entitled to any declaratory relief, but it has  
23 not moved for dismissal. While the FCC takes exception to United  
24 Artists' characterization that the agency is enforcing the TCPA

25 \_\_\_\_\_

26 <sup>7</sup> The supplemental jurisdiction argument was raised for the  
27 first time at oral argument, and while ESI's counsel ably  
28 disputed its applicability, the court would ordinarily allow ESI  
an opportunity to brief the issue before issuing a ruling. This  
particular matter, however, may be resolved in ESI's favor  
without the need for additional briefing.



1 "aggressively," it states that it lacks sufficient information to  
2 respond to United Artists' claim of injury on account of pending  
3 enforcement actions against it. Answer (doc. #14) ¶¶ 6, 14. In  
4 short, United Artists' sole remaining argument in favor of finding  
5 jurisdiction over its claims against ESI hangs on an assertion of  
6 original jurisdiction subject to a dispute that is not presently  
7 before the court.

8 Under the supplemental jurisdiction statute, except as  
9 expressly provided otherwise by federal statute, federal courts  
10 exercise jurisdiction "over all other claims that are so related  
11 to claims in the action within such original jurisdiction that  
12 they form part of the same case or controversy under Article III  
13 of the United States Constitution." 28 U.S.C.A. § 1367(a) (West  
14 1993 & Supp. 1999). Assuming that the state claims arise out of a  
15 common nucleus of operative facts with the federal claims, the  
16 statute allows the court discretion to refuse to exercise  
17 jurisdiction in four circumstances:

- 18 (1) the claim raises a novel or complex issue of state  
19 law  
20 (2) the claim substantially predominates over the claim  
21 or claims over which the district court has original  
22 jurisdiction,  
23 (3) the district court has dismissed all claims over  
24 which it has original jurisdiction, or  
25 (4) in exceptional circumstances, there are other  
26 compelling reasons for declining jurisdiction.

27 28 U.S.C.A. § 1367(c); Acri v. Varian Associates, Inc., 114 F.3d  
28 999, 1001 (9<sup>th</sup> Cir. 1997) (en banc). If one of the listed "factual  
predicates" arises, a district court's has discretion to refuse  
jurisdiction. Executive Software North America, Inc. v. U.S.  
District Court, 24 F.3d 1545, 1557 (9<sup>th</sup> Cir. 1994). Discretion is  
informed by considering whether the exercise of jurisdiction

1 advances "the values of economy, convenience, fairness, and  
2 comity." Id.

3 Supplemental jurisdiction will not be extended to United  
4 Artists' claims against ESI for two reasons. First, the  
5 supplemental jurisdiction statute confers a general grant of  
6 jurisdiction that is canceled when another federal statute  
7 expressly provides otherwise. 28 U.S.C.A. § 1367(a). The  
8 discussion above establishes that the TCPA mandates exclusive  
9 state court jurisdiction over private causes of action. As  
10 explained by the Third Circuit, Congress's efforts to vest  
11 exclusive jurisdiction in other courts over certain causes of  
12 action may not be derailed by resort to general jurisdictional  
13 statutes. See ErieNet, 156 F.3d at 518; see also Connors v. Amax  
14 Coal Co., Inc., 858 F.2d 1226, 1231 (7<sup>th</sup> Cir. 1988). Thus, by the  
15 express terms of section 1367(a), which allows supplemental  
16 jurisdiction only as long as another statute does not provide  
17 otherwise, and by the logic prohibiting federal question  
18 jurisdiction over United Artists' claim, supplemental jurisdiction  
19 is unavailable.

20 Second, the claims against the FCC and ESI cannot be  
21 construed as arising out of the same case or controversy. Under  
22 the TCPA, private parties may bring actions to enjoin unsolicited  
23 faxes and phone calls in state court if state law recognizes such  
24 actions. 47 U.S.C. § 227(b)(3). The FCC, however, is charged with  
25 implementation and enforcement of all relevant statutory  
26 provisions, see id. §§ 151, 154, and the TCPA contemplates similar  
27 enforcement. Id. §§ 227(b)(2), 227(f)(7). An enforcement action  
28 by the FCC is necessarily entirely distinct from one brought by a

1 private party. Subject matter jurisdiction is wanting and the  
2 claims against ESI shall be dismissed.<sup>8</sup>

3 B. Abstention

4 As an alternate ground for decision, ESI recommends that the  
5 court abstain from adjudicating the case against it. Given the  
6 complexity of the issues involved, reaching the alternate ground  
7 is advisable. To the extent that abstention presupposes the  
8 existence of jurisdiction, the following discussion goes forward  
9 on the possibility that subject matter jurisdiction exists here.  
10 Cf. Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d  
11 1249, 1250 (9<sup>th</sup> Cir. 1987) (Court of Appeals disagreed with district  
12 court on subject matter jurisdiction issue but affirmed on

13 \_\_\_\_\_  
14 <sup>8</sup> Were supplemental jurisdiction otherwise available,  
15 grounds for discretionary refusal exist, and such refusal would  
16 be advisable under the circumstances. Of the four fact scenarios,  
17 28 U.S.C. § 1367(c)(3) might apply if the court had an  
18 opportunity to decide whether it had original jurisdiction over  
19 the claim against the FCC before having to decide this motion.  
20 In fairness, the ESI claims cannot be said to "substantially  
21 predominate" over the FCC claims, but attempting to apply  
22 subsection (c)(2) here only points up the implausibility that the  
23 two sets of claims can be considered part of the same case or  
24 controversy. The residual factual predicate for "exceptional  
25 circumstances" would apply, however. On reviewing the  
26 legislative history of the Judicial Improvements Act of 1990, the  
27 Ninth Circuit explained that subsections (c)(1)-(c)(3) codify  
28 "concrete applications" "recognized by courts to date," while  
subsection (c)(4) "carries forward the possibility of their  
further extension." Executive Software, 24 F.3d at 1560. By all  
accounts, Congress's decision to isolate private TCPA actions in  
state courts is highly unusual. See, e.g., Murphey, 204 F.3d at  
915. The compelling considerations that motivated Congress to  
devise the jurisdictional requirements of the TCPA suffice, where  
state courts are available to interpret the statute's  
constitutionality, to create a compelling reason to decline  
jurisdiction here. Moreover, opening a federal action would be  
inefficient considering the pendency of an action in a state  
forum presenting the same issues. To do so would be unfair to  
ESI. If the exercise of jurisdiction were discretionary, the  
court would decline.

1 abstention issue).

2 Abstention theories were created by judges and are subject to  
3 the meanderings of the common law, but a leading treatise  
4 organizes the cases into four doctrines: (1) Pullman abstention,  
5 to skirt a federal constitutional question where the case may be  
6 disposed of on questions of state law; (2) Burford abstention, to  
7 avoid needless conflict with the administration by a state of its  
8 own affairs; (3) abstention to allow states to resolve unsettled  
9 questions of state law; and (4) Colorado River abstention to  
10 avoid duplicative litigation. See 17A Wright, et al., Federal  
11 Practice & Procedure § 4241 at 28-29 (2d. ed. 1988 and Supp.  
12 2000). The Colorado River doctrine has been interpreted in  
13 relation to a case called Brillhart, which applies specifically  
14 when a federal declaratory judgment action is filed during the  
15 pendency of a state court action. See Wilton v. Seven Falls Co.,  
16 115 S.Ct. 2137, 2141-42 (1995) (construing Brillhart v. Excess  
17 Ins. Co. of America, 316 U.S. 491, 62 S.Ct. 1173 (1942)). Both  
18 Colorado River and Brillhart permit federal courts to defer to  
19 concurrent state court adjudication, but Brillhart sets federal  
20 declaratory judgment actions apart as a unique subset. While  
21 under the Colorado River doctrine "extraordinary circumstances"  
22 must be present to warrant abstention, when Brillhart applies,  
23 district judges have discretion to abstain. Wilton, 515 U.S. at  
24 288, 115 S.Ct. at 2143. "Ordinarily, it would be uneconomical as  
25 well as vexatious for a federal court to proceed in a declaratory  
26 judgment suit where another suit is pending in a state court  
27 presenting the same issues, not governed by federal law, between  
28 the same parties." Brillhart, 62 S.Ct. at 1175-76. Consequently,

1 abstention may be invoked more readily when a declaratory judgment  
2 action is presented.

3 Brillhart diverges from Colorado River due to the different  
4 attributes of federal subject matter jurisdiction over declaratory  
5 judgments. Colorado River requires the presence of "exceptional  
6 circumstances" to get around the general imperative that federal  
7 courts must exercise jurisdiction they are given. Colorado River  
8 Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct.  
9 1236; New Orleans Public Service, Inc. v. Council of City of New  
10 Orleans, 109 S.Ct. 2506, 2512-13 (1989). In contrast, the grant  
11 of jurisdiction in the Declaratory Judgment Act is optional,  
12 providing that a court "may declare the rights and other legal  
13 relations of any interested party seeking such a declaration." 28  
14 U.S.C. § 2201(a). Because district courts may refuse to offer  
15 declaratory relief when considerations of "practicality and wise  
16 judicial administration" prevail, Wilton, 115 S.Ct. at 2143,  
17 abstention for those reasons is governed by the same discretion.  
18 "Brillhart makes clear that district courts possess discretion in  
19 determining whether and when to entertain an action under the  
20 Declaratory Judgment Act, even when the suit otherwise satisfies  
21 subject matter jurisdictional prerequisites." Id. at 282, 115  
22 S.Ct. at 2140.<sup>9</sup>

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23  
24 <sup>9</sup> If the court decides to abstain, dismissal is disfavored  
25 and imposition of a stay is preferred. See Wilton, 115 S.Ct. at  
26 2143, n.2. In the event that the state court action does not  
27 resolve the controversy before the federal court, lifting the  
28 stay puts the parties back in the same position they were in  
before the decision to abstain, whereas statute of limitations  
and other problems may crop up if the declaratory plaintiff must  
revive its action by refileing. See id. (citing P. Bator, et al.,  
Hart and Wechsler's The Federal Courts and the Federal System,  
1451, n. 9 (3<sup>rd</sup> ed. 1988)).

1       An obstacle to straightforward application of the Brillhart  
2       abstention doctrine to this case is the murkiness of its scope.  
3       See generally 17A Charles Alan Wright, et al., Federal Practice  
4       and Procedure § 4247 at 145-46 (2d ed. 1988). In a concurrence  
5       that is viewed as critical to understanding the Colorado River  
6       doctrine, Justice Blackmun suggests that Brillhart, which is  
7       founded on diversity jurisdiction, has no application in cases  
8       posing a federal question. See Will v. Calvert Fire Ins., 437  
9       U.S. 655, 667, 98 S.Ct. 2552, 2560 (1978) (Blackmun, J.,  
10      concurring in the judgment).<sup>10</sup> The opinion of the plurality, to  
11      which four justices subscribed, indicates that the jurisdictional  
12      basis for claims stayed by abstention is not an overbearing  
13      consideration. See id. at 664, 666 n. 9; 98 S.Ct. at 2558, 2559  
14      n.9.

15      Turned around, Blackmun's statement suggests that exercise of  
16      diversity jurisdiction is somehow more optional than exercise of  
17      federal question jurisdiction. Blackmun's brief concurrence does  
18      not reveal the theory undergirding this proposition. It is worth  
19      noting, however, that Will did not arise from a federal action for  
20      declaratory relief, but rather for damages. Thus, Will cannot be  
21      read without adjusting for the additional discretion that federal  
22      judges wield in declaratory actions.

23      

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24      <sup>10</sup> Will concerned the propriety of mandamus writs to compel  
25      district courts to proceed with adjudication of matters  
26      concurrently pending in state court. 437 U.S. at 657, 98 S.Ct. at  
27      2554. The state action included claims under both state and  
28      federal law; the federal action raised similar issues but added a  
    claim for which federal jurisdiction is exclusive. Only the  
    parallel claims for which concurrent jurisdiction existed were  
    stayed by the federal district judge. Id. at 659, 98 S.Ct. at  
    2555. The claim for which jurisdiction existed only in federal  
    court went forward.

1        In Wilton, the court discussed Brillhart abstention as if the  
2 court's discretion to deny declaratory relief were guided only by  
3 efficiency concerns, but in summing up, narrowed its holding: "We  
4 do not attempt at this time to delineate the other boundaries of  
5 that discretion in other cases, for example, cases raising issues  
6 of federal law or cases in which there are no parallel state  
7 proceedings." Wilton, 115 S.Ct. at 2144. The Wilton court did not  
8 venture to set forth rules for applying Brillhart to cases  
9 implicating other jurisdictional principles. As a consequence, the  
10 clearly articulated rationale supporting abstention where a  
11 declaratory action seeks duplicative relief collides with the  
12 principle that jurisdiction must be exercised if a federal  
13 question arises.

14        In fact, the nature of the issue the Wilton Court declined to  
15 reach is not entirely clear: in those cases where a federal  
16 question is raised, does the federal question arise in the claim  
17 for declaratory relief, or does it appear in a separate claim  
18 included in the declaratory complaint? The first possibility is  
19 the one broached by Justice Blackmun; the second possibility has  
20 been resolved in the Ninth Circuit.<sup>11</sup> In the present matter, only

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22        <sup>11</sup> The Ninth Circuit has observed that when a declaratory  
23 claim is accompanied by other claims that are properly in federal  
24 court, dismissal of either the declaratory claim or the entire  
action is likely inappropriate. See Snodgrass v. Providence Life  
& Acc. Ins. Co., 147 F.3d 1163, 1168-69 (9<sup>th</sup> Cir. 1998) (per  
curiam).

25        Because claims of bad faith, breach of contract, breach  
26 of fiduciary duty and rescission provide an independent  
27 basis for federal diversity jurisdiction, the district  
28 court is without discretion to remand or decline to  
entertain these causes of action. Indeed, the district  
court has a "virtually unflagging" obligation to  
exercise jurisdiction over these claims.

1 the first possibility concerns the court, for United Artists'  
2 complaint seeks solely declaratory relief.

3       Notwithstanding the limits of Wilton, other authorities  
4 support federal court deferral to state court actions even when  
5 federal statutes are to be construed. See Exxon Shipping Co. v.  
6 Airport Depot Diner, Inc., 120 F.3d 1266, 1269-70 (9<sup>th</sup> Cir. 1997).  
7 In Exxon Shipping, the Court of Appeals found the district  
8 court's entry of judgment on a declaratory claim an abuse of  
9 discretion. "Contrary to the district judge's view, the federal  
10 court has no overriding 'duty to protect the uniformity of federal  
11 maritime law' from the rulings of a state court judge; indeed, it  
12 has no right to do so." Id. at 1270.

13       Similarly, in upholding exclusive state court jurisdiction  
14 over TCPA actions, the Second Circuit expressly endorsed deferral  
15 to state courts if actions on the same issue commenced there  
16 first. See Foxhall Realty, 156 F.3d at 437. The Foxhall  
17 plaintiff pointed out that exclusive state jurisdiction over the  
18 actions of private parties would prevent consolidation of private  
19 actions with actions by state attorneys general. It believed that  
20 such a result was absurd. The Second Circuit disagreed, however,  
21 because "the first suit should have priority absent a showing of  
22 balance of convenience in favor of the second action to suits  
23 commenced in different districts over the same issue" Id. (citing  
24 Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421, 423 (2d Cir.  
25 1965)). While Mattel involved competing cases filed in separate  
26 United States District Courts, the Second Circuit in Foxhall  
27 \_\_\_\_\_  
28 Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225 n.6  
(9<sup>th</sup> Cir. 1998) (en banc).



1 transferred its rule of accommodation to the TCPA context.<sup>12</sup>

2 The court concludes that the federal constitutional issue  
3 raised by United Artists' complaint does not inhibit its  
4 discretion to decline jurisdiction. To bring a claim pursuant to  
5 the Declaratory Judgment Act, the statute requires only that the  
6 anticipated suit be subject to federal jurisdiction. 28 U.S.C. §  
7 2201. The propriety of judicial refusal to exercise jurisdiction  
8 is not contingent on the nature of the federal subject matter  
9 prerequisites of a given claim.

10 While there is no question that the presence of an issue of  
11 federal law is a significant factor to be considered, abstention  
12 depends on the facts of particular cases, and in this case, the  
13 presence of the federal issue is of less moment than Congress's  
14 express direction against federal jurisdiction.<sup>13</sup> Given that  
15 Congress has allocated the interpretation and application of the  
16 TCPA to state courts to complement pre-existing state law causes  
17 of action, there is no strong reason why a federal court should  
18 interlope on a state adjudication of a § 227(b) claim. The state  
19 courts are equally capable of determining the legality of the

20

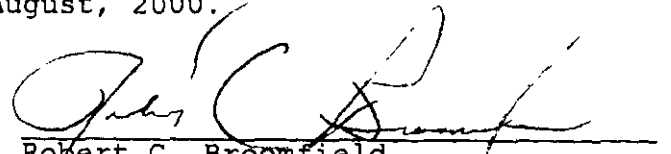
21 <sup>12</sup> The principle determining the result in Mattel is that  
22 when the first-filed action will resolve the same issues between  
23 the parties, the court of the second-filed suit must defer to the  
24 first court and not compete by attempting to exert its  
25 jurisdiction concurrently. See Kerotest Mfg. Co. v. C-O-Two Fire  
Equipment Co., 342 U.S. 180, 185, 72 S.Ct. 219, 222 (1951). The  
26 principle is no less applicable when the courts set in  
27 competition against each other are a federal district court and a  
28 state court.

29 <sup>13</sup> "A refusal to exercise jurisdiction for reasons within the  
30 sound principled discretion of the court is not the kind of ad  
31 hoc refusal to entertain an action that flirts with treason to  
32 the Constitution." David L. Shapiro, Jurisdiction and  
Discretion, 60 N.Y.U. L. Rev. 543, 573 (1985).

1 statute under the federal constitution. See generally Paul Bator,  
2 State Courts and the Federal Constitution, 22 Wm. & Mary L. Rev.  
3 605 (1981). Accordingly, in the event that this court has subject  
4 matter jurisdiction over United Artists' claim against ESI, the  
5 public interest in preventing piecemeal litigation and the clear  
6 Congressional intent to delegate cases under the statute to state  
7 courts recommends abstention.

8 THEREFORE IT IS ORDERED, granting Defendant ESI's motion to  
9 dismiss (doc. #6).

10 DATED this 16 day of August, 2000.

11  
12   
13 Robert C. Broomfield  
Senior United States District Judge

14 Copies to counsel of record

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